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Blake A. Field VS Google, Inc.,

SEP 2004

Doc. 17

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BLAKE A. FIELD,

Plaintiff,

vs.

GOOGLE, INC., a corporation

Defendant.

Case No. CV-S-04-0413-RCJ-LRL

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF"S MOTION TO STRIKE DEFENDANT'S COUNTERCLAIMS AND PORTIONS OF DEFENDANT'S ANSWER

COMES NOW Plaintiff Blake A. Field to file his Reply to Defendant's Opposition to Plaintiff's Motion to Strike Defendant's Counterclaims and Portions of Defendant's Answer in the above entitled matter.

I. "Facts" alleged by Defendant in its Opposition are wholly irrelevant to the issues posited by the Motion to Strike.

Defendant begins its Opposition with nearly two and a half pages of "background" facts prior to addressing any issue raised by Plaintiff's motion. Deplorably, for a large portion of the supposed facts asserted, Defendant cites no competent evidence in support thereof, but merely makes reference to the allegations contained in Defendant's Counterclaims as if they are fact. See Opposition, pp. 3, lines 15-22; pp. 4, lines 1-2. Other factual assertions are made without reference to any competent evidence whatsoever. See Opposition at pp. 10, lines 10-13.

Regardless of Defendant's improper factual allegations, the fact remains that Plaintiff's Motion to Strike is a motion that is based and properly decided upon the face of the pleadings alone. No factual information beyond the pleadings is relevant to deciding the motion. Therefore, these irrelevant allegations put forth by Defendant as "background" should be wholly disregarded by the Court when deliberating upon Plaintiff's motion.

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II. Plaintiff's Motion to Strike furthers the case by seeking to eliminate improper and redundant matter set forth by Defendant's Answer and Counterclaims.

Defendant's Opposition references Germaine Music v. Universal Songs of Polygram, 275 F.Supp.2d 1288 (D. Nev. 2003), in support of its notion that courts disfavor Motions to Strike, as they are often used as delaying tactic or for other improper purposes. However, at no turn does Defendant argue that Plaintiff's motion was put forth for an improper purpose. And, even though courts may be wary of motions to strike, the facts of this case make clear that the instant motion is proper in light of the redundancies and other improprieties of Defendant's Answer and Counterclaims.

III. Defendant contorts the meaning of Paragraph 7 of the Complaint until it

Defendant denied the following averment in the Complaint based on lack of knowledge:

> 7. Plaintiff is the sole owner of the registered copyrights in 51 original literary works ("the works"). Those registrations have an effective date of January 16, 2004. A listing of the works and their respective registration numbers is attached hereto as Exhibit A.

Plaintiff's Motion to Strike points out that these facts are upon public record available via the Copyright Office's website at www.copyright.gov, and because they are public record may not be denied based on lack of knowledge.

Critically, at no turn does Defendant state that it undertook a search of the public records contained on the Copyright Office's website prior to denying the allegation based on lack of knowledge. Rather, Defendant's arguments make clear that it has been Defendant's post-hoc determination that Copyright Office's public records do not offer sufficient information to admit or deny any portion of the allegation. Defendant's failure to enquire of the public records prior to its denial on lack of knowledge is contrary to FRCP Rules 8(b) and 11(b) and such failure alone is a sufficient basis to strike Defendant's answer to Paragraph 7 and deem the averment admitted.

Even more astounding than Defendant's lack of inquiry is Defendant's wrenching contortion of the allegations of Paragraph 7 to justify Defendant's supposed lack of knowledge. Defendant's argument that it cannot determine whether Plaintiff is the sole owner of the copyright from public records is disingenuous. Defendant admits that the records on file at the Copyright Office show the identity of the claimant(s)/registrant(s). Were Defendant to have performed a search, it would have determined that those works specified by Plaintiff by name and registration number are registered to only one claimant: the Plaintiff. Therefore, it is easily established that Plaintiff is the sole owner of the copyrights in those works. Even if Defendant were left in doubt as to whether Plaintiff had transferred his rights in any of the works, Defendant could have likewise search the Copyright Office's public records to determine if any transfers have been recorded – Defendant, however, makes no such assertion, likely because Defendant made no such attempt. Because Defendant failed to make any inquiry into pertinent public records prior to denying Paragraph 7 based on lack of knowledge, that denial is improper and in bad faith and should therefore be stricken and deemed admitted.

IV. Defendant's contrary factual averments to Paragraph 16 of the Complaint are improper.

Paragraph 16 of Plaintiff's First Amended Complaint provides:

> 16. Defendant does not seek authorization from copyright owners prior to reproducing and publicly distributing works stored in Google's cache.

In answer to Paragraph 16 of Plaintiff's First Amended Complaint, Defendant states:

> 16. In response to the allegations in Paragraph 16, **Google avers** that it has the authorization necessary, if any, to operate its system cache, but otherwise denies the allegations in Paragraph 16. (emphasis added).

As set forth in Plaintiff's motion, Plaintiff seeks to strike the contrary factual averments in the above response because they do not comport with the requirements of Rule 8(b) nor the rule stated in Metropolitan Life Ins. Co. v. Przybil, 2002 U.S. Dist. LEXIS 22756 at (N.D. IL 2002).

Defendant baldly asserts – without analysis or argument whatsoever – that the rules and case law cited by Plaintiff are inapplicable. Defendant's inability to articulate any pertinent reason why these authorities are inapplicable clearly illustrates the invalidity of Defendant's position.

Rather than admitting or denying the averment, here Defendant has sought to argue with the premise of the averment itself. Plaintiff's averment alleges that Defendant does not seek authorization from copyright owners, not whether Defendant has authorization to operate its cache. If it is Defendant's position that it does not need any authorization from copyright owners prior to reproducing and publicly distributing works stored in Google's cache, then Defendant necessarily does not seek authorization to do so and therefore is under a duty to admit the allegation to that extent.

V. Defendant's Counterclaims seek declaratory relief for issues that are not before the Court.

According to the language in the Motionless Keyboard Co. case cited by Defendant, "[a]n affirmative defense is simply asserted to defend against plaintiff's claims; a counterclaim seeks specific relief." Defendant then admits that its counterclaims are not seeking specific relief, and rather are merely being used to defend against Plaintiff's claims: "In this case, [Defendant] seeks declaratory judgment with respect to Plaintiff's allegations of infringement against Google." See Oppostion at Footnote 7. This is an important admission, as it shows that even in Defendant's eyes, its counterclaims for declaratory relief are necessarily related to Plaintiff's claims -- that is, but for Plaintiff's claims of infringement they could not exist. Without Plaintiff's claims, there would be no case or controversy relative to Defendant's counterclaims.

Plaintiff cites several highly distinguishable cases in support of its position that counterclaims which are redundant to affirmative defenses are permissible. Each and every case cited by Plaintiff deals with the limited context of patent infringement and the affirmative defense/counterclaim of patent invalidity. A defendant/counterclaimant's charge of patent invalidity is a claim separate, distinct and unrelated to the claims a Plaintiff may bring. While it can serve as an affirmative defense, a declaratory relief action for patent invalidity is a cause of action in its own right and does not require any other action or threat of action to properly be a case or controversy. It is upon this notion that the courts have ruled that a counterclaim of patent invalidity which mirrors an invalidity affirmative defense is permissible. Even if a favorable decision is made as to a differing affirmative defense, the invalidity issue may still remain as a separate cause of action because it is not rendered moot by the resolution of the plaintiff's claims.

In this case, there is no claim by Defendant of invalidity of Plaintiff's copyright. All of Defendant's counterclaims, by Defendant's own admission, are necessarily related to Plaintiff's allegations and advanced only to defend against Plaintiff's claims. They could not stand on their own absent Plaintiff's allegations, as there would be no case or controversy before the court.

Defendant's nebulous argument for the necessity of the redundant counterclaims makes clear Defendant is seeking declaratory judgment with regard to theoretical controversies not presently before the Court:

> Google's affirmative defenses are merely defenses to Plaintiff's claims for relief. If Field chooses to dismiss his current claims against Google, Google's affirmative defenses will also be dismissed. Likewise, if Field's charges of infringement fail because of some copyright formality (e.g. invalidity, lack of originality), or because he cannot establish a prima facie case of infringement, Google's affirmative defenses would be moot. Google could thus face future claims of infringement from Field on the same or other works.
>
> Through its counterclaims for declaratory relief, Google seeks to obtain an unambiguous declaration that the standard operation of its system cache does not support a claim of copyright infringement by Field.

See Opposition at pps. 7-8. As this makes clear, Defendant is not seeking a declaration with regard to the works and infringement at hand. Rather, Defendant desires a declaration of noninfringement as against any work, whether existing or theoretical, and as related to any future instance of infringement of those works by way of the Google cache. Such theoretical instances of infringement or claimed infringement do not constitute a case or controversy for the Court decide.

VI. Defendant admits that its Affirmative Defenses are insufficiently pled.

Tellingly, in its Opposition, Defendant admits that its affirmative defenses are insufficiently pled: "...Google detailed the factual underpinnings for each of its affirmative defenses in its counterclaims." At no turn are the facts alleged by Defendant in its counterclaims tied to any one affirmative defense. Simply positing a littany of facts without asserting their relation to any affirmative defense does not give fair notice of the defense to Plaintiff. Moreover, the facts alleged by Defendant in its counterclaims would necessarily relate only to those affirmative defenses which the counterclaims improperly mirror, namely: fair use, implied license and the DMCA safe harbor. One is left to guess how those facts pertain to Defendant's remaining affirmative defenses.

Defendant's attempt to distinguish Qarbon.com, Inc. v. eHelp Corp., 315 F.Supp. 2d 1046, is flawed. "Since this case is not a patent infringement action like *Qarbon*, there is no possibility of confusion between 'prosecution history estoppel'...and the equitable estoppel upon which Google relies." See Opposition at footnote 8. This is the first indication that the "estoppel" mentioned in Defendant's affirmative defenses is equitable estoppel. In fact, Defendant does not mention the type of estoppel relied upon in its affirmative defense of estoppel, which is precisely why Plaintiff sought to strike it – and the other improperly pled affirmative defenses – in the first place.

Plaintiff agrees with Defendant in that these affirmative defenses should be stricken, subject to Defendant's ability to properly re-plead them to provide fair notice of the defenses to Plaintiff.

VII. Defendant admits that its mitigation of damages and contributory fault affirmative defenses are denials, and therefore are not properly affirmative defenses.

As detailed in Plaintiff's motion, denials are not properly asserted as affirmative defenses. In its Opposition, Defendant argues that the Court has wide discretion in setting statutory damages and that mitigation of damages and contributory fault should be a part of the Court's calculus. Regardless, the fact remains that damages arguments are merely denials, and not properly asserted as affirmative defenses. Again, Defendant has cited no case law showing that affirmative defenses of mitigation of damages and contributory fault are proper in copyright actions. On the contrary, Plaintiff cites to Yash Raj Films (USA) Inc. v. Atlantic Video, Copy. L. Rep. (CCH) P28,806 (N.D. IL 2004), wherein the court struck the Defendant's similar affirmative defense of apportionment of fault. Likewise, Defendant's mitigation of damages and contributory fault affirmative defenses are also properly stricken in this instance.

VIII. Conclusion.

For the above reasons, it has been shown that Defendant's Opposition to Plaintiff's Motion to Strike is without merit. Therefore, Plaintiff respectfully requests the Court to grant Plaintiff's Motion to Strike and grant the relief prayed for therein.

Dated the 21st day of September, 2004.

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion to Strike was served this 21st Day of September 2004 by placing same in US Mail to:

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